Supreme Court No. 85410-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ERICK DESHUM JORDAN,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

In Washington, when self-defense is raised, it becomes an element of the substantive charged offense, and the State bears the burden of proving its absence beyond a reasonable doubt. The trial court enhanced petitioner Erick Deshum Jordan's SRA offender score with a Texas conviction for the crime of voluntary manslaughter to which Jordan had claimed self-defense. The law of self-defense in Texas at the time that Jordan was convicted (1) imposed a more stringent burden of production than is required in Washington, (2) permitted the use of deadly force only to combat deadly force or an attempt to use deadly force, and (3) imposed a duty to retreat.

This Court should hold that the significant differences between the self-defense element in Texas and Washington precluded the use of this conviction to elevate Jordan's SRA offender score. The resulting sentence violated his right to due process because he received increased punishment for conduct that may not have been a crime in Washington.

B. ISSUES PRESENTED FOR REVIEW

1. Does the use of foreign convictions that are not legally comparable to Washington offenses to increase the SRA offender score violate the Fourteenth Amendment right to due process of law because it

permits punishment to be enhanced based conduct that may not have led to conviction in Washington State?

2. Because self-defense, when raised in a Washington case, becomes an element of the substantive offense that the State must disprove beyond a reasonable doubt, should this Court hold that the State's attempt to increase Jordan's punishment based on a Texas conviction in which he claimed self-defense requires consideration of the Texas definition of self-defense in its comparability analysis? Where the law of self-defense at the time that Jordan was convicted was fundamentally different and more restrictive than in Washington, did the use of the Texas conviction to elevate Jordan's offender score and presumptive standard range violate his right to due process?

C. STATEMENT OF THE CASE

Erick Deshum Jordan was convicted in King County Superior Court of one count of murder in the second degree with a firearm enhancement and one count of unlawful possession of a firearm. At sentencing, the State alleged that Jordan's SRA offender score on the murder conviction was eight points, and on the unlawful possession of a firearm conviction six points. The State based this calculation on four

prior adult felony convictions obtained in Washington[1] and a prior juvenile conviction for "voluntary manslaughter," obtained in Limestone, Texas, in 1992.

Jordan objected to the inclusion of the Texas conviction in his offender score and argued that the crime was not comparable to a Washington felony. CP 146, 150; RP 7-8.[2] The trial court ruled that the crime was comparable to the Washington offense of murder in the second degree, explaining, "a person under that factual scenario would be convicted of murder in the second degree in Washington." RP 19-20. Based on the court's calculation of Jordan's offender score, his standard sentence range for the murder conviction was 317-417 months incarceration,[3] and for the unlawful possession of a firearm count 57-75 months incarceration. Had the prior Texas conviction been excluded from Jordan's offender score, his properly-calculated standard range for the murder conviction would have been 245-325 months incarceration, and 36-48 months for the unlawful possession of a firearm conviction. The

[1] One of Jordan's prior convictions was for robbery in the second degree, which, as a prior violent felony, adds two points to the SRA offender score.

[2] Only the transcript of the sentencing hearing on January 16, 2009, is cited in this brief. Citations to the hearing are referenced as "RP" followed by page number.

[3] The ordinary standard range for the offense would have been 257-357 months incarceration; the adjustment reflects the five-year firearm enhancement.

court imposed concurrent high-end sentences of 417 months and 75 months, respectively. CP 155.

In a partially-published opinion, the Court of Appeals held that (1) self defense is not a non-statutory element of the offense and thus not germane to the comparability analysis; and (2) the prior Texas conviction for voluntary manslaughter was legally comparable to the Washington crime of manslaughter in the first degree. Slip Op. at 2-9. This Court has granted Jordan's petition for review.

D. ARGUMENT

1. **Principles of due process require a fair sentencing proceeding.**

Fundamental principles of due process require fair sentencing proceedings. Mitchell v. United States, 526 U.S. 324, 329, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999); U.S. Const. amend. XIV; Const. art. I, § 3. Due process thus "prohibit[s] a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record." State v. Ford, 147 Wn.2d 472, 481, 973 P.2d 452 (1999). "[M]isinformation, misunderstanding, or material false assumptions 'as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.'" Ford, 147 Wn.2d at 481 (citation omitted).

Where the State seeks to enhance a defendant's sentence by the use of prior convictions, principles of due process require the State to prove both the existence and classification of those convictions. Ford, 137 Wn.2d at 480-481; accord State v. Hunley, 175 Wn.2d 901, 910, 287 P.3d 584 (2012). As this Court stated,

> The burden lies with the State because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove."

Hunley, 175 Wn.2d at 910 (quoting In re the Personal Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)); see also id. at 915 (Ford and its progeny rest upon a judicial interpretation of the constitution).

2. **The right to a fair sentencing proceeding requires the State to prove the existence and comparability of out-of-state prior convictions before they may be used to increase punishment.**

The Sentencing Reform Act of 1981 permits criminal sentences to be enhanced by the use of convictions obtained in other states. RCW 9.94A.525(3). First, however, they must be classified: "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." Id.; Ford, 137 Wn.2d at 483. The statute permits the use of federal convictions to increase the offender score, even where there is no clearly comparable

offense under Washington law.[4] RCW 9.94A.525(3). By contrast, no similar provision exists with regard to out-of-state convictions. Where out-of-state convictions are not clearly comparable to Washington offenses, they must be excluded from the SRA offender score.

To determine whether a foreign conviction is comparable to a Washington offense, the court engages in a two-step analysis. First, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479 (citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). If the elements of the foreign conviction are comparable to the elements of a Washington offense on their face, the foreign offense counts toward the offender score as if it were the comparable Washington offense. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements of the prior offense are not comparable, or are broader than the pertinent crime in Washington, then the court may look to the facts admitted by the defendant or proved by indictment or trial to determine if the prior offenses are comparable. Id. at 256-57.

As recent precedent from the United States Supreme Court makes clear, however, this inquiry must be limited to ensure it does not infringe

[4] If there is no clearly comparable offense under Washington law, or if the crime is one subject to exclusively federal jurisdiction, it is treated like a Class C felony. RCW 9.94A.525(3).

upon the Sixth Amendment right to a jury determination of the facts necessary to increase punishment. Descamps v. United States, __ U.S. __, __ S.Ct __, __ L.Ed.2d __, 2013 WL 3064407, 7 (June 20, 2013).[5] Even during the "factual" analysis, the focus remains upon the elements, rather than the facts of the underlying crime; the analysis functions as a mechanism for comparing elements "when a statute lists multiple, alternative elements, and so effectively creates 'several different ... crimes.'" Id. The goal is "to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." Id. Any further inquiry risks contravening the Sixth Amendment right to a jury trial. Id. at 10

> While it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.

Morley, 134 Wn.2d at 606.

As this Court explained in Lavery:

> Where the foreign statute is broader than Washington's, [an examination of the underlying facts] may not be possible because there may have been no incentive for the accused to have attempted to prove that he did not commit the narrower offense.

[5] At the time of this writing, only pin citations to the Westlaw reporter were available.

Lavery, 154 Wn.2d at 257 (citation omitted); compare Descamps, 2013 WL 3064407 at 5 ("if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form").

The concern is that substantive differences in the criminal law of foreign jurisdictions may result in the defendant being punished for conduct for which he may have had a legitimate defense in Washington. See Lavery, 154 Wn.2d at 258 ("Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under the robbery statute but were unavailable in the federal prosecution"). Such an outcome violates the Fourteenth Amendment guarantee of due process. See Lavery, 154 Wn.2d at 257.

3. **When it is raised, self-defense becomes an element of a substantive offense, the absence of which the State bears the burden of proving beyond a reasonable doubt.**

The right to self-defense in Washington has long-standing roots in our common-law jurisprudence, and is codified by statute. State v. McCullum, 98 Wn.2d 484, 491, 656 P.2d 1064 (1983); State v. Meyer, 96 Wash. 257, 264, 164 P. 926 (1917); RCW 9A.16.020. The use, attempt, or offer to use force in Washington is lawful

> [w]henever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary.

RCW 9A.16.020(3).

The Legislature has also codified the right to commit homicide in self-defense:

> Homicide is … justifiable when committed either:
>
> (1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother, or sister, or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or
>
> (2) In the actual resistance of an attempt to commit a felony upon the slayer, in his or her presence, or upon or in a dwelling, or other place of abode, in which he or she is.

RCW 9A.16.050.

"A self defense claim is 'predicated upon the right of every citizen to reasonably defend himself against unwarranted attack.'" State v. Janes, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). Thus, in Washington, a killing done in self defense is a lawful act. McCullum, 98 Wn.2d at 492. This Court held in McCullum that changes to the criminal code that placed the self-defense component of a homicide charge in a separate section of the

statute[6] did not alter the State's burden with respect to the charge or its elements:

> By removing the words "unless it is excusable or justifiable" from the definition of homicide and including self-defense under the provisions of RCW 9A.16, entitled "Defenses", the Legislature merely relieved the State of the time-consuming and unnecessary task of alleging and proving negative propositions which may not be involved in each case. Once the issue of self-defense is properly raised, however, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt.

Id. at 493-94.

This Court further explained, "Since self-defense is explicitly made a 'lawful' act under Washington law … it negates the element of 'unlawfulness' contained within Washington's statutory definition of criminal intent.'" Id. at 495 (internal citations omitted). This Court held that because self-defense, when raised, is an element and an "essential ingredient of the crime charged," the State must prove that the defendant did not act in self-defense beyond a reasonable doubt. Id. at 496.

This Court has not deviated from this rule. See State v. O'Hara, 167 Wn.2d 91, 105, 217 P.3d 756 (2008) (constitutional requirement that

[6] Under Washington's old criminal code, homicide was murder or manslaughter unless it was "excusable or justifiable." Laws of 1909, ch. 249, §§ 140, 141, 143, pp. 930–31. With the adoption of a new criminal code in 1975, the Legislature removed this language from the definition of homicide and instead included it in a separate section entitled "defenses." McCullum, 96 Wn.2d at 491.

jury be instructed as to each element charged applies to self-defense); City of Bremerton v. Widell, 146 Wn.2d 561, 570, 51 P.3d 733 (2002) (reiterating that "self-defense is a statutory defense and, as such, once properly raised, the absence of self-defense becomes another element of the offense which the State must prove beyond a reasonable doubt"); State v. Allery, 101 Wn.2d 591, 595, 682 P.2d 312 (1984) (a claim that homicide was justifiable because done in self defense requires jury "to consider the conditions as they appeared to the slayer, taking into consideration all the facts and circumstances known to the slayer at the time and prior to the incident"); State v. Wanrow, 88 Wn.2d 221, 234, 559 P.2d 548 (1977) (same).

4. **Because self-defense is an element, and because the law of self-defense in Texas at the time Jordan was convicted was fundamentally more restrictive than in Washington, Jordan's prior Texas conviction was not comparable to a Washington offense and should have been excluded from his offender score.**

Notwithstanding this Court's explicit holdings in McCullum and subsequent decisions, the Court of Appeals held that the absence of self-defense "is not a true 'element' of murder or manslaughter." Slip Op. at 4. The Court instead averred that "[r]eferences to the absence of self-defense as an element serve as shorthand for the principle that the State bears the burden to disprove the defense once properly raised." Id. The Court cited

McCullum as authority for this pronouncement, even though McCullum held precisely the opposite.[7] McCullum, 98 Wn.2d at 493-94.

As this Court in McCullum held, the significance of the 1975 statutory changes was only that they relieved the State from the burden of pleading and proving the absence of self-defense in every case, even when it might not be an issue. Id. But it was clear from this Court's decision in that case and from subsequent decisions treating the issue, cited infra, that self-defense remains an element of the substantive offense, even if it appears in a different statute – much like attempt, conspiracy, or solicitation. See Chapter 9A.28 RCW.

The implications from self-defense's unique role at common law and by statute as an element of a substantive charge are manifold. Because, when raised, self-defense is an element, the State must prove its absence beyond a reasonable doubt. McCullum, 98 Wn.2d at 493-94. An accused person is entitled to an instruction on self-defense so long as there is some evidence, from any source, to support the defense. McCullum, 98 Wn.2d at 488. In a homicide prosecution, the accused must show only that he feared "great personal injury" in order for his use of deadly force to

[7] In fact, the word "element" does not appear anywhere in the Sixth Amendment. It is just "shorthand" for 'facts that the state must prove to obtain a conviction.' See Alleyne v. United States, __ U.S. __, __ S.Ct. __, __ L.Ed.2d __, 2013 WL 2922116, 4 (June 17, 2013) ("Any fact that, by law, increases the penalty for a crime is an "element" that must be submitted to the jury and found beyond a reasonable doubt").

be lawful. RCW 9A.16.050(1). A jury evaluating the reasonableness of a claim of self-defense considers not only the events immediately surrounding the killing, but also those known substantially before the killing. Allery, 101 Wn.2d at 595; Wanrow, 88 Wn.2d at 234. And, in Washington, a person has no duty to retreat from an assault when he is in a place where he has a right to be, but may repel force with force. State v. Redmond, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003); Meyer, 96 Wash. at 264.

a. The right to self-defense in Texas when Jordan was convicted was substantially more restrictive than in Washington.

In Texas, when Jordan was convicted of voluntary manslaughter, the law of self-defense was different and considerably more restrictive than it is in Washington. His self-defense claim could only succeed if Jordan used deadly force because it appeared necessary to protect himself or a third person against another person's use or attempted use of unlawful deadly force. CP 55. Texas law required Jordan to show that a reasonable person in his situation would not have retreated. Tex. Penal Code Ann. § 9.32 (Vernon 1974 and Vernon Supp. 1991);[8] Broussard v. State, 809

[8] Tex. Penal Code Ann. § 9.32 (1991) provided, in pertinent part:

A person is justified in using deadly force against another:

. . . .

S.W. 2d 556, 558 (1991); CP 55. To obtain an instruction on self-defense, Jordan had to present affirmative proof that he acted in self-defense. Saxton v. State, 804 S.W.2d 910, 913-14 (Tex. 1991). And the legitimacy of a claim of self-defense or defense of others in Texas was restricted to the circumstances immediately surrounding the use of force. Nance v. State, 807 S.W. 855, 863 (Tex. 1991) (holding that woman was barred from raising a claim of defense of others where she attempted to rescue her son from her ex-husband, who she believed had sexually assaulted her son, had physically abused and raped her, and who she believed was stalking her with a loaded gun); compare with Allery, 101 Wn.2d at 594-95. The Texas jury deciding the charge of voluntary manslaughter against Jordan was instructed consistent with these limitations.[9]

b. The differences between the law of self-defense in Texas and in Washington prevented the prior conviction from being comparable to any crime in Washington.

The goal of the comparability analysis under the SRA is "to ensure that defendants with prior convictions are treated similarly, regardless of

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(2) if a reasonable person in the actor's situation would not have retreated; and
(3) when and to the degree he reasonably believes the deadly force is immediately necessary:
(A) to protect himself against the other's use or attempted use of unlawful deadly force.

[9] A copy of pertinent instructions issued to Jordan's Texas jury is attached to this brief.

where those convictions occurred." Morley, 134 Wn.2d at 602. This concern – that similarly situated defendants be treated alike with regard to punishment for prior conduct – goes hand-in-hand with the strong interest in ensuring punishment is based upon reliable information, and is rooted in due process. Hunley, 175 Wn.2d at 910, 915; Ford, 147 Wn.2d at 481-92.[10]

i. The crime was not legally comparable to any crime in Washington.

Here, the elements of Jordan's Texas prosecution for voluntary manslaughter necessarily included the element that his use of deadly force was not justifiable, as the same conduct if prosecuted in Washington would have included this element. McCullum, 98 Wn.2d at 493-94. As shown, the statutory definition of self-defense in Texas would have permitted Jordan to be convicted if the jury found he had a duty to retreat. He also could have been convicted if the jury found that he had not produced enough evidence to show he was acting in self-defense, or if the jury had concluded that the victim had threatened not deadly force, but

[10] The Court of Appeals believed that "[c]omparison of out-of-state offenses in calculating an offender score … is a statutory mandate, not a constitutional one." Slip Op. 4. This misses the point and, more importantly, fundamentally mistakes this Court's precedent. In light of Descamps and Alleyne, it also rests on a flawed premise. As this Court reemphasized in Hunley, the right to a valid sentence is grounded in due process. Hunley, 175 Wn.2d at 910, 915.

great personal injury. In Texas, therefore, Jordan could have been convicted based on a broader range of conduct than would have been possible in Washington.

ii. Because the foreign offense is broader than any potentially comparable Washington crime, no factual analysis is possible.

The substantial and substantive differences between the law of self-defense in Texas and Washington compel the conclusion that the Texas offense of voluntary manslaughter is broader than any potentially comparable Washington crime. Thus, any further effort to determine whether Jordan's conduct would have resulted in conviction if he had been tried in Washington violates due process and the Sixth Amendment right to a jury trial. Compare Descamps, 2013 WL 3064407 at 5, 7[11] (if foreign statute sweeps more broadly than generic offense, "a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form"); Lavery, 154 Wn.2d at 258 ("Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable").

[11] As discussed infra, constitutional limitations preclude courts from engaging in an extensive factual analysis to determine whether the defendant's conduct would have constituted a crime in Washington. Descamps, __ 2013 WL 3064407 at 5-10; Morley, 134 Wn.2d at 606.

Because the Texas offense criminalized a broader range of conduct than any potentially comparable Washington offense, similar to Lavery, Jordan had "no incentive … to prove that he did not commit the narrower offense."[12] This Court should conclude that the inclusion of the Texas conviction for voluntary manslaughter in Jordan's SRA offender score resulted in Jordan being punished for conduct that may not have resulted in conviction in Washington. The resulting sentence violated due process.

[12] It is of course possible that Jordan did prove that he committed the narrower offense, but the Texas jury could not have acquitted him on this basis.

E. CONCLUSION

The absence of self-defense in Washington, when raised, is an element of a criminal charge that the State must disprove beyond a reasonable doubt. This Court should hold that in appropriate cases, self-defense is properly considered in a comparison of the elements of out-of-state convictions with potentially comparable Washington offenses. Here, fundamental differences between the law of self-defense in Texas and Washington permitted Jordan to be convicted in Texas based on conduct that may not have resulted in conviction in Washington. This Court should hold that Jordan's prior Texas conviction for voluntary manslaughter was thus not comparable to any Washington crime, and that the use of the crime to elevate his SRA offender score violated due process.

DATED this _____ day of June, 2013.

Respectfully submitted:

_____

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